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In the Supreme Court of the United States

OCTOBER TERM, 1959

OTIS W. LIVINGSTON, ET AL., INDIVIDUALLY AND AS CONSTITUTING THE SOUTH CAROLINA TAX COMMISSION, APPELLANTS

v.

UNITED STATES OF AMERICA AND E. I. DU PONT DE NEMOURS AND COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA

MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
MYRON C. BAUM,
Attorney,
Department of Justice, Washington 25, D.C.

LOREN K. OLSON,
General Counsel,
ALLEN M. COKER,
Chief Counsel,
Savannah River Operations Office
LIONEL KESTENBAUM,
Attorney,
Atomic Energy Commission, Washington 25, D.C.
HUGH K. CLARK,
DANIEL F. MARPLE, II,
W. GRAHAM CLAYTOR, JR.,
STEPHEN J. POLLAK,
COVINGTON & BURLING,
701 Union Trust Building, Washington 5, D.C.
Attorneys for E. I. du Pont de Nemours and Company.

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellees move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court which enjoined, as unconstitutional, the imposition by the State of South Carolina of sales and use taxes upon the purchase and use of materials for the Atomic Energy Commission ("AEC") by E. I. du Pont de Nemours and Company ("du Pont"), as the management contractor for

the AEC's production facilities located in South Carolina, known as the Savannah River Plant. The district court (Circuit Judges Sobeloff and Haynsworth, with District Judge Timmerman dissenting) held that under the "unusual" cost-plus-no-profit management contract between AEC and du Pont, the latter was "without hope of gain" or "risk of loss" (Jur. St. 31), that "du Pont's procurement activities resulted in the sale of goods and services to the United States," and that "the purchases were those of the United States and immune from ordinary sales and use taxes upon the purchaser" (Jur. St. 39).

The AEC's Savannah River Plant was begun in 1950 as an essential part in the development of a thermonuclear weapon. It consists of nine principal plants and supporting facilities—five nuclear reactors for the production of plutonium and other materials, and four plants for the production of heavy water, the fabrication of reactor fuel elements, and the processing of reactor products (Exh. P–4).[1] The Sa-

[1] Trial exhibits, which constitute part of the certified transcript of record filed in this Court but which have not been bound with the remainder of the record, will be cited hereinafter as "Exh. P–1," "Exh. P–2," etc. The remaining portions of the certified transcript of record have been bound in three volumes and will be cited as follows: Volume I of the transcript, composed of various pleadings, orders and formal papers below, and paginated consecutively, will be cited as "I–R." Volume II of the transcript, which is the stenographic transcript of the hearing of August 4, 1958, before District Judge Timmerman on motion for temporary restraining order, will be cited as "II–R." Volume III of the transcript, which is the stenographic transcript of the trial of September 22, 1958, before Circuit Judges Sobeloff and Haynsworth and District Judge Timmerman, will be cited as "III–R."

vannah River Plant was designed and constructed and is now operated for the AEC by du Pont under what the court below characterized as an "extraordinary" management contract (Jur. St. 28), providing for extensive control and supervision by AEC and excluding either profit or risk of loss to du Pont (Exh. P-2, Arts. II(2), XIV(2), XXXIV; Jur. St. 30–32, 38).[2] A brief summary of the circumstances which led to the formulation of this contract will give perspective to a consideration of its pertinent provisions.

During the second World War, du Pont at the request of the Government had operated the Manhattan Engineering District's Hanford Works. The company undertook that responsibility only upon the specific understanding that its action was required in the interest of the national security and that it would be relieved promptly after the war since the work was entirely outside the field of chemistry where its commercial activities lay. In 1946, it accordingly withdrew from this atomic energy project (III-R. 138–141). In June 1950, upon the launching of an emergency program aimed at development of the hydrogen bomb, du Pont was again asked by the Government to lend its experience, organization and

[2] Our reference to the contract between du Pont and AEC is throughout to Exh. P-2, the definitive Contract No. AT (07-2)-1, dated September 30, 1953, but effective the date work commenced, August 1, 1950. The previous letter contract, Exh. P-1 (dated October 11, 1950, effective as of August 1, 1950) was merged with and superseded by Exh. P-2 (Exh. P-2, p. 3).

services in the design, construction and operation of this essential new plant. As the court below pointed out, this work was not sought by du Pont and was undertaken by it reluctantly and only on the basis of a clear need on behalf of the security of the nation, a need expressed directly to du Pont by the President of the United States and the Atomic Energy Commission (Jur. St. 29, 40; Exh. P-5; III-R. 139-140).

The contract between AEC and du Pont expressly provided that the construction and operation of the Savannah River Plant was to be without either cost or profit to du Pont, that the latter was to receive a fee of only one dollar, and that any patents or technical data resulting from du Pont's work at the project would become the property of the United States (Exh. P-2, Arts. II(2), XIV(2), XVIII(1), XXV(1), XXXIV).[3]

[3] In explaining to stockholders why du Pont undertook the construction and operation of the Savannah River Plant on this basis, its president pointed out that the company's position remained, as it had been when it withdrew from operation of the Hanford project, in 1946, that its efforts "should be concentrated in its chosen field of chemistry, leaving the development of atomic energy for peacetime applications to those companies whose commercial interest was more closely allied with the field of physics." He explained, however, that du Pont felt that in "the interests of national security * * * it must again place its experience and technical resources at the disposal of the Government by undertaking this new project", and that at the company's request, "the new contract provides that the Government pay all costs, that du Pont receive a fee of one dollar, and that any patents growing out of du Pont's work become the property of the Government". He concluded by explaining that "[w]hile recognizing fully management's obligation to earn a profit on its operations, it is

The South Carolina Sales and Use Tax Act here involved imposes a three percent tax on sales of tangible personal property within the state (S.C. Code (1952), Secs. 65–1401, 65–1407), and a complementary three percent tax on the "storage, use, or other consumption ~~within~~ this ~~the~~ state" of tangible personal property purchased outside the state (S.C. Code (1952), Secs. 65–1367, 65–1421, 65–1422(1)). The Act broadly defines "sale" to include "[a]ny transfer * * * of tangible personal property for a consideration", and "use" to include "the exercise of any right or power over tangible personal property incident to the ownership of that property or by any transaction in which possession is given * * *" (S.C. Code (1952), Secs. 65–1360, 65–1367).[4]

On May 12, 1958, the South Carolina Tax Commission issued a formal letter ruling that du Pont was liable for such taxes upon its purchases and use of property "for and in connection with the construction and/or operation of the Savannah River Plant of the Atomic Energy Commission located in this State" (I–R. 51). All parties below conceded that, but for the constitutional immunity of the United States from state taxation, there would be no bar to the taxes sought to be imposed under the broad provisions of these tax statutes (III–R. 68–69, 76). At issue in

felt that the nature of this undertaking makes it inappropriate to require a fee for the Company's services" (Exh. P–3).

[4] S.C. Code (1952), Sec. 65–1361.1, effective March 20, 1954, specifically purports to make these taxes applicable to purchase or use by "contractors purchasing such property either (a) as agents of the United States or its instrumentalities, or (b) for their own account for use in the performance of contracts with the United States or its instrumentalities".

this proceeding, according to computations by appellees, are use taxes in the amount of $1,738,000 imposed with respect to materials purchased from out-of-state vendors from October 1, 1953, through March 31, 1958, and sales taxes amounting to $52,000 levied upon purchases from South Carolina vendors during the period October 1, 1953, through March 20, 1954 (I–R. 25–26).[5]

Appellants conceded that title to all the property in question passed directly from the vendor to the Government, and that du Pont's use of such property was "solely on behalf of the United States" (III–R. 49–50, 55). The court below so found and, reviewing the terms of the contract and its implementation in detail, ruled that, at Savannah River, du Pont was the "alter ego" of the AEC, "without hope of gain, except the nominal one dollar" and with "no risk of loss" (Jur. St. 31). It further specifically found that, under the unusual circumstances here, du Pont's purchases for the Savannah River Plant "were those of the United States" (Jur. St. 39), and that the use of materials at the plant was also "so completely that of the United States" (Jur. St. 41) that state taxation was precluded. The district court rejected appellants'

[5] While the validity of the use tax presents a continuing question in the operation of the Savannah River Plant, the sales tax issue is limited to the brief period stated in the text. Effective March 20, 1954, the South Carolina Act was amended to repeal the prior requirement of Sec. 65–1407 that sales taxes paid by sellers must be collected from the purchasers. S.C. Acts (1954), Vol. 48, No. 644, pp. 1566, 1682–1683. The estimate of taxes due begins with October 1, 1953, since, until then, taxes against du Pont as an AEC contractor were clearly barred by a provision of the Atomic Energy Act of 1946, n. 8, *infra*, p. 13.

contention that du Pont had a "separable beneficial and taxable use" of the property because of purchases from du Pont's commercial divisions and the possible training of du Pont employees (Jur. St. 39–41).

ARGUMENT

Appellants challenge both the jurisdiction of the district court to enjoin the collection of these taxes, and the substantive holding that imposition of the taxes is unconstitutional because of the contractual and factual relationships between du Pont and AEC and the absence of any separable beneficial interest of du Pont in the construction and operation of the Savannah River Plant. These two questions were fully considered by the court below and all of the contentions now advanced by appellants were rejected in the comprehensive opinion of Circuit Judge Haynsworth (Jur. St. 19–43). We submit that the decision below is correct and that there is no substantial question warranting plenary hearing by this Court.

I

THE COURT BELOW HAD JURISDICTION TO ENJOIN COLLECTION OF STATE TAXES BY APPELLANTS

Appellants' sole challenge to the jurisdiction of the court below rests upon 28 U.S.C. 1341, which provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State [Jur. St. 8].

The district court rejected this contention on two separate grounds: (1) there is not a "plain, speedy and efficient remedy in the courts of" South Carolina (Jur. St. 27); and (2) 28 U.S.C. 1341 does not apply to suits by the United States to enjoin the unconstitutional application of state taxes to it (Jur. St. 21). Both rulings are correct, and either one is sufficient to sustain the jurisdiction of the district court.

A. It is well settled that payment of a tax followed by suit in the state courts for refund is not "a plain, speedy and efficient remedy" unless interest will be paid on any judgment entered. *Educational Films Corp.* v. *Ward*, 282 U.S. 379, 386, fn. 2; *Hopkins* v. *Southern California Tel. Co.*, 275 U.S. 393, 399–400, *affirming* 13 F. 2d 814, 820 (C.A. 9); *Butler* v. *D. A. Schulte, Inc.*, 67 F. 2d 632, 635 (C.A. 5); *Procter & Gamble Distributing Co.* v. *Sherman*, 2 F. 2d 165 (S.D.N.Y.); *Nutt* v. *Ellerbe*, 56 F. 2d 1058 (E.D.S.C.); *Southern Ry. Co.* v. *Query*, 21 F. 2d 333 (E.D.S.C.).* For, as Judge Learned Hand succinctly pointed out in *Procter & Gamble Distributing Co.*, "a dollar today is worth more than a dollar next year," 2 F. 2d at 166. Although in his dissenting

* Although the cases cited in the text did not arise under 28 U.S.C. 1341, the general equitable principle that they enunciated is equally applicable here. By use of the traditional equity condition of "plain, speedy and efficient remedy," Congress clearly imported settled principles of federal equity jurisdiction for accommodation of federal and state remedies under 28 U.S.C. 1341. *Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 299; *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620, 623. The pertinent committee reports stated, in fact,

opinion below Judge Timmerman characterized this expression as "a trite saying, a cliche, too unsubstantial to supplant the sovereignty of a sovereign state, if indeed a mere court decision could accomplish that result" (Jur. St. 47), Judge Hand's ruling has been uniformly adopted in the cited decisions of this Court and of the lower federal courts.

In the instant case, the only state remedy available to appellees was payment of the taxes under protest and suit for refund under S.C. Code (1952), Secs. 65–1466 and 65–1467. These sections make no express provision for the award of interest. State statutes do provide for the payment of interest upon administrative refunds (S.C. Code (1952), Sec. 65–1459), but prior to this suit appellants themselves construed this section as inapplicable to a suit for refund (Jur. St. 25; I–R. 51, 56–57; II–R. 35–36, 41). All members of the court below, which included two judges from South Carolina (Circuit Judge Haynsworth and District Judge Timmerman) concluded, after a careful analysis of the South Carolina statutory and case law, that there is at least a substantial doubt under state law as to the right to recover interest in a tax refund suit.[7] "Great deference," of course, is due this determination of state law by federal judges "who are familiar with the intricacies and trends of local law and practice" (*Huddleston* v. *Dwyer,* 322 U.S. 232, 237; *Township of Hillsborough* v. *Cromwell,* 326 U.S. 620,

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that the provision "does not take away any equitable right of the taxpayer." S. Rep. 1035, 75th Cong., 1st Sess., p. 2; H. Rep. 1503, 75th Cong., 1st Sess., p. 2.

[7] The majority concluded that "there is presently grave doubt of the existence of a right to recover interest" (Jur. St. 27).

629–630; *Propper* v. *Clark*, 337 U.S. 472, 486–487). And as the court below recognized (Jur. St. 27), under 28 U.S.C. 1341 the right to interest must be "plain," not uncertain or speculative, to bar equitable relief. *Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 605; *Hillsborough* v. *Cromwell*, 326 U.S. at 625–629; *Denton* v. *City of Carrollton, Georgia*, 235 F. 2d 481, 485 (C.A. 5).[7a]

District Judge Timmerman agreed, saying: "If the tax is held invalid, the taxpayer is refunded the amount paid with or without interest as the State Court may determine" (Jur. St. 48). Their conclusion was consistent with the decisions of the Supreme Court of South Carolina which hold that statutes waiving the state's immunity against suits for tax refunds are to be strictly construed to exclude situations not expressly within their terms (*Bomar* v. *City of Spartanburg*, 181 S.C. 453; *Argent Lumber Co.* v. *Query*, 178 S.C. 1), and that interest is not to be awarded against the state except upon express provision therefor in a statute or lawful contract (*Monarch Mills* v. *South Carolina Tax Commission*, 149 S.C. 219; *Colonial Life & Acc. Ins. Co.* v. *South Carolina Tax Commission*, 233 S.C. 129, 152). State statutes make no provision for the award of interest in a judicial proceeding for recovery of taxes paid under protest. See text, *supra*, p. 9. As the court below noted, the 1958 *Colonial Life* decision denied interest in a refund action under statutes similar to the Sales and Use Tax Act (Jur. St. 24–25). The fact that appellants first construed South Carolina law to deny interest in a tax refund suit (*supra*, p. 9), and only under the pressure of the instant litigation reversed their position, further demonstrates the uncertainty of the state remedy and the inapplicability of 28 U.S.C. 1341.

[7a] There is obviously no merit to appellants' contention (Jur. St. 8) that the district court should have stayed its hand pending a determination by the state courts of whether a state court judgment for refund of taxes includes interest. As the cases cited in the text plainly hold, the very existence of this doubt under state law renders the state remedy inadequate; a claimant is not required to pay the disputed tax and assume the risk that the state court will eventually permit him to recover interest.

B. Every federal court that has passed on the question has held that 28 U.S.C. 1341 is not in any event applicable to suits by the United States to enjoin the unconstitutional imposition of state taxes. *United States* v. *Woodworth*, 170 F. 2d 1019 (C.A. 2); *Board of Compissioners* v. *United States*, 139 F. 2d 248 (C.A. 10); certiorari denied, 321 U.S. 795; *City of Springfield* v. *United States*, 99 F. 2d 860 (C.A. 1), certiorari denied, 306 U.S. 650; *United States* v. *68,716 Square Feet of Land*, 79 F. Supp. 438 (S.D. N.Y.) affirmed on this point, reversed on other grounds *sub nom. United States* v. *City of New York*, 175 F. 2d 75 (C.A. 2), certiorari denied, 338 U.S. 885; *United States* v. *Okaloosa County*, 59 F. Supp. 426 (N.D. Fla.); Jur. St. 20–22.

This unbroken line of authority is fully supported by the legislative history of 28 U.S.C. 1341, which shows that it was enacted specifically to prevent out-of-state corporations from challenging state and local taxes in lengthy federal court proceedings (not available to citizens of the state) during the pendency of which payment of taxes was withheld. S. Rep. 1035, 75th Cong., 1st Sess., p. 2; H. Rep. 1503, 75th Cong., 1st Sess., pp. 2–3; 81 Cong. Rec. 1416–1417. The provision does not in terms refer to the United States, and the legislative history contains no intimation of any intent to make it applicable to the Federal Government. Accordingly, this is an appropriate case for application of the settled principle that "general statutes imposing restrictions do not apply to the Government itself without a clear expression to that effect." *Federal Power Commission* v. *Tuscarora*

Indian Nation, 362 U.S. 99, 120. This Court has deemed this principle particularly compelling when the right of the United States to obtain federal injunctive relief is involved. *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220; *United States* v. *United Mine Workers*, 330 U.S. 258; *United States* v. *American Bell Telephone Co.*, 159 U.S. 548.

C. The court below also considered the question of whether, apart from its jurisdiction or power to grant equitable relief, it should in its discretion stay its hand. The determination by the court that under these special circumstances no such exercise of discretion was appropriate plainly presents no question of substance here. Unlike the situation in *Spector Motor Service, Inc.* v. *McLaughlin*, 323 U.S. 101, and *United States* v. *City of New York*, 175 F. 2d 75, certiorari denied, 338 U.S. 885, no issue of state law is involved. All parties conceded at the trial that, but for the questions raised under the Constitution of the United States, there was liability for the state taxes involved (III-R. 68-69, 76), and the court below accordingly found that the only issue presented was "not dependent upon the resolution of any question of state law" (Jur. St. 22). Similarly, the doctrine that a federal court of equity should in an appropriate case "refuse to give its special protection to private rights when the exercise of its jurisdiction would be prejudicial to the public interest" (*Great Lakes Dredge & Dock Co.* v. *Huffman*, 319 U.S. 293, 297-98), is plainly inapplicable, since the interests of the United States are involved here and since the remedy afforded by an action in the state courts is in any event not adequate (see *supra*, pp. 8-10, see also *Pub-*

lic Utilities Commission v. *United States*, 355 U.S. 534, 539–540). Under these circumstances no substantial contention can be made that the court below abused its discretion in refusing to dismiss the complaint or to stay proceedings pending action in the state courts.

II

THE COURT BELOW PROPERLY ENJOINED SOUTH CAROLINA FROM TAXING DU PONT'S PURCHASE AND USE OF MATERIALS FOR THE ATOMIC ENERGY COMMISSION AT THE SAVANNAH RIVER PLANT

A majority (Circuit Judges Sobeloff and Haynsworth) of the three-judge district court held that South Carolina could not constitutionally impose its sales and use taxes upon du Pont's purchase and use of AEC property at the AEC's Savannah River Plant. That ruling was based upon a close analysis of the "extraordinary" contractual relationship between du Pont and AEC at this plant, as a result of which the court found that du Pont's purchases and use of materials were those "of the United States" and immune from taxation, and that du Pont had no "separable beneficial" interest subject to taxation (Jur. St. 28, 39, 41).[4] We submit that, in so

[4] The district court also correctly held that there was no Congressional waiver of the Government's constitutional immunity from the instant taxes. In 1953, Congress repealed the last sentence of Section 9(b) of the Atomic Energy Act of 1946 (60 Stat. 755, 765–766), exempting "the property, activities and income of the Commission" from state taxation, which had barred sales and use taxes upon AEC contractors, as held in *Carson* v. *Roane-Anderson Co.*, 342 U.S. 232. P.L. 262, 67 Stat. 575.

holding, the district court correctly applied the standards for determining the constitutional immunity of Federal activities from state taxation developed by this Court, and reiterated only two years ago. There is, therefore, no substantial question concerning the applicable law. This appellants apparently concede by devoting the bulk of their argument to "the correctness of the findings of the trial Court" (Jur. St. 9–12). Moreover, the exhaustive findings below are abundantly supported by the record and indeed by appellants' own concessions. There is, accordingly, also no factual question of substance now presented.

A. THE APPLICABLE STANDARD OF GOVERNMENTAL IMMUNITY

"In the absence of Congressional consent, as this Court has recently reiterated, the Constitution forbids the states from taxing "the Government of the United States or its property," *United States* v. *City of Detroit,* 355 U.S. 466, 469; cf. *Rohr Aircraft Corp.* v. *San Diego,* No. 295, this Term, decided May 23, 1960. The decisions of this Court also leave no doubt, as appellants recognize (Jur. St. 13), that the relationship between the Government and a contractor may be such that the constitutional immunity of the United States extends to acts of the contractor. *United States* v. *Township of Muskegon,* 355 U.S. 484, 486; *Kern-*

However, this clearly did not constitute consent to taxation. Congress intended merely to "place the Commission and its activities on the same basis, with respect to immunity from State and local taxation, as other Federal agencies. Immunity from taxation will be by virtue of the Constitution of the United States, as interpreted by the courts." S. Rep. 694, 83d Cong., 1st Sess., p. 3; see Jur. St. 33–34.

Limerick, Inc. v. *Scurlock*, 347 U.S. 110, 117, 122; *McCulloch* v. *Maryland*, 4 Wheat. 316, 436. Appellants would limit this principle to situations where the contractor is "a contractually declared agent of the United States" (Jur. St. 11-14). This Court has made it plain, however, that "[c]onstitutional immunity from state taxation does not rest on such insubstantial formalities." *United States* v. *Township of Muskegon*, 355 U.S. at 486. The Court "must look through form and behind labels to substance" (*City of Detroit* v. *Murray Corporation*, 355 U.S. 489, 492), and must consider "all relevant circumstances" (*United States* v. *City of Detroit*, 355 U.S. at 469; cf. *Rohr, supra*).

Whether the contractor is formally designated as "agent" of the United States in the contract is not controlling. The critical inquiry is whether the contractor has sufficient independent private interest to render it separately taxable; if not, the taxable property or act (*e.g.*, purchase, use, possession) is that of the United States and immune from taxation.[9] This is the precise approach taken by the court below when it examined the relevant facts and circumstances, held

[9] This principle is illustrated by the line of decisions leading up to the 1958 Michigan cases, in each of which the immediate taxpayer was clearly a private contractor, and the question posed was whether in effect the United States was the purchaser (sales tax—*Kern-Limerick, Inc.* v. *Scurlock*, *supra*; *Alabama* v. *King & Boozer*, 314 U.S. 1); the user (use tax—*Curry* v. *United States*, 314 U.S. 14); the one exercising a privilege of storage (privilege tax—*Esso Standard Oil Co.* v. *Evans*, 345 U.S. 495); or the owner of property (property tax—*United States* v. *County of Allegheny*, 322 U.S. 174). In *Kern-Limerick* and *Allegheny County*, the claim of immunity was sustained.

that the Government's constitutional immunity is "not dependent upon the use, or omission, of a magic label" (Jur. St. 38), and concluded that the purchase and use of the property in question were those of the United States.

The recent Michigan cases reaffirmed that the constitutionality of a state tax upon a private party's dealings with Government property depends essentially upon the existence of a commercial benefit accruing to the private party from such dealings, or at least upon the existence of an opportunity to use the property for the party's own benefit. In *United States* v. *Township of Muskegon*, 355 U.S. 484, the Court upheld the constitutionality of a use tax based on the value of Government property used by a company (Continental Motors) in the course of performing supply contracts for profit with the United States, stating (355 U.S. at 486):

> The vital thing under the Michigan statute, and we think permissibly so, is that Continental was using the property in connection with its own commercial activities. The case might well be different if the Government had reserved such control over the activities and financial gain of Continental that it could properly be called a "servant" of the United States in agency terms. But here Continental was not so assimilated by the Government as to become one of its constituent parts. It was free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them.

The Court thus indicated that elements necessary to the finding of taxability of a contractor were, in addition to the existence of the contractor as a private commercial enterprise, its separate interest in conducting operations under the contract for its own "financial gain" or "in maximizing its profits," and the contractor's freedom from Government supervision and control, *i.e.*, its ability "within broad limits to use the property as it thought advantageous and convenient" for its own purposes. See 355 U.S. at 486.

Similarly, in *United States* v. *City of Detroit*, 355 U.S. 466, a Michigan tax on the use of Government property by a private party was found constitutional where the use was "in a business conducted for profit." The Court emphasized that the tax was "imposed on a party using tax-exempt property for its own 'beneficial personal use' and 'advantage'." 355 U.S. at 467, 472. Finally, in the third of the 1958 cases, *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, the taxpayer's use of Government property in furtherance of its private commercial business was again the crucial constitutional fact in sustaining a personal property tax (355 U.S. at 493):

> As applied—and of course that is the way they must be judged—the taxes involved here imposed a levy on a private party possessing government property which it was using or processing in the course of its own business. * * * In their practical operation and effect the taxes in question are identical to those which we upheld in [*City of Detroit* and *Township of Muskegon*] * * *. We see no essential difference so far as constitutional tax immunity is concerned

between taxing a person for using property he possesses and taxing him for possessing property he uses when in both instances he uses the property for his own private ends.

In the light of these cases, it would seem beyond dispute that where (as here) the court finds no beneficial private interest, nor any opportunity to use property for such an interest, state taxation is unconstitutional because, in the words of Chief Justice Marshall, it would be a tax "on the operation of an instrument employed by the government of the Union to carry its powers into execution." *McCulloch* v. *Maryland*, 4 Wheat. at 436–437. See also *United States* v. *County of Allegheny*, 322 U.S. 174, 176–177.

B. THE FINDINGS AND THE EVIDENCE BELOW

The applicable law is settled. Accordingly, the central issue appellants present to this Court is one of fact: whether the record supports the district court's findings that du Pont's purchase and use of materials at the Savannah River Plant were those "of the United States," and that du Pont was acting as the "alter ego" of the United States, without any separable beneficial interest, and "without hope of gain, except the nominal one dollar, payable upon final completion of the contract" (Jur. St. 31–32, 39–41).

Although appellants assert the existence of a "substantial question as to the correctness of the findings of the trial Court" (Jur. St. 10), they fail to cite any evidence at all from the record below.[10] The correctness of the findings below is, indeed, established by the

[10] This lack is not remedied by appellants' citation of a state court's characterization of du Pont's activities at Hanford

uncontradicted testimony in the record, the conceded facts concerning the operation of the Savannah River Plant, and the terms of the "extraordinary" no-profit contract between AEC and du Pont (see *supra*, pp. 3–5).

1. The fundamental facts showing the absence of any independent commercial interest in du Pont were actually stipulated by appellants in open court (III–R. 49–50):

> Each and every operation carried on by du Pont in the procurement and physical use of the material here involved was solely on behalf of the United States. Du Pont did not, as a matter of fact exercise any separate interest in the property involved. Its procurements were solely on behalf of the United States. Its physical use of the property owned by the United States was to accomplish the aims of the United States. At no time did du Pont have the beneficial use of such property for its private ends. The state reserves its position that du Pont had a profit motive in this contract. * * *

Thus, while seeking to infer a "profit motive" from alleged indirect advantages to du Pont (*infra*,

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during the Second World War (Jur. St. 11). *E. I. du Pont de Nemours & Co.* v. *State*, 44 Wash. 2d 339. Each case must be weighed on its own facts. Moreover, the record below shows that there are differences between du Pont's relationship with the Government at Hanford and at Savannah River. See III–R. 144–145.

Appellants' complaint that the court below should have separately stated its findings of fact and conclusions of law (Jur. St. 9) is answered by the provision of F. R. Civ. P., Rule 52(a), that it is sufficient for such findings and conclusions to appear in the court's opinion.

pp. 24–26), appellants concede that it had no direct commercial interest whatever in the operation of the Savannah River Plant.[11] As the record shows, du Pont does not have any property of its own at Savannah River, nor does it undertake any commercial use of the Government's property (III–R. 43, 55, 119, 121; Exh. P–2, Art. XIII(1)). Du Pont does not even utilize its own funds, but finances the operation and pays for materials by drawing directly upon Government funds which are advanced from time to time, and placed in bank balances belonging to the United States and treated as public deposits (Exh. P–2, Art. XVII; III–R. 124–126). Further implementing the intent that the only business at Savannah River is the AEC's, the contract specifically provides that all work is done at the Government's risk and expense, with none to du Pont (Exh. P–2, Arts. II(2), XXXIV);[12] and that while payment or reimbursement

[11] This concession is particularly significant, since, in this Court's 1958 tax immunity cases, *supra*, pp. 16–18, Michigan sought to tax only private commercial enterprises. Indeed, the use tax involved was in terms directed only against use "by a private individual, association or corporation in connection with a business conducted for profit * * *." *United States* v. *City of Detroit*, 355 U.S. 466, 467–468 n. 1. In contrast, not only does the South Carolina Sales and Use Tax Act contain no such limitation, but it expressly purports to cover sales to, and use by, contractors acting "(a) as agents of the United States or its instrumentalities, or (b) for their own account for use in the performance of contracts with the United States or its instrumentalities * * *." S.C. Code (1952), Sec. 65–1361.1. Moreover, it contains no analogous provisions taxing the agents or instrumentalities of the state.

[12] Du Pont's status, as solely the manager of AEC's plant, is exemplified in the unusually broad indemnity clause. Art. XXXIV of the contract (Exh. P–2) provides that in view of the

of all expenses is guaranteed (Exh. P–2, Arts. XV, XXXIV), du Pont is entitled only to "[a] fixed-fee in the amount of one dollar ($1.00)" (Exh. P–2, Art. XIV(2)).[13]

2. Nor do appellants controvert any of the facts concerning the extensive control maintained by the AEC over the Savannah River Plant operations—control, which, when taken with the absence of profit in the undertaking, was sufficient to make du Pont, in the words of the court below, the "alter ego" of the Government (Jur. St. 30–32).

At the hearing below, indeed, appellants specifically conceded that du Pont's employees at Savannah River operated under the AEC's "control * * * practically man by man" and under AEC's "over-all direction" (III–R. 8, 38–39). Appellants have further conceded that the contract between du Pont and AEC, and the allegations of the complaint in this case, correctly represent the actual method of operation, supervision and

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fixed fee of one dollar, the unusual and unpredictable hazards and the nature, scope, and magnitude of the work, the Government shall indemnify and hold du Pont harmless against any delay, failure, loss, expense or damage of any kind and for any cause whatsoever, arising out of or connected with the work, and whether or not any employee or employees of the Contractor is or are responsible, unless caused directly by bad faith or wilful misconduct on the part of specified corporate officers acting within the scope of their authority and employment.

[13] The contract further provides that any drawings, designs, specifications or technical data developed under it are to be the property of the AEC (Exh. P–2, Art. XVIII(1)), and patentable discoveries or inventions are subject to the AEC's disposition, without pecuniary compensation to du Pont (Exh. P–2, Art. XXV(1)).

control in effect at Savannah River (III–R. 42, 55, 48–49, 109). Accordingly, it must be taken as established that, as the contract states, the Commission has "power to exercise appropriate control over the contract work and full access to information concerning the Contractor's performance of such work" (Exh. P–2, Art. IV). The contract provides, and the record shows, that AEC inspects and audits all activities of the Contractor under the contract (Exh. P–2, Art. XVIII(4); III–R. 117, 127) and requires detailed reports as to many of them (Exh. P–2, Art. XVIII (6); Exh. P–6).

Particularly close supervision by the AEC of the procurement of supplies and materials is provided. AEC reviews and audits all purchases (Exh. P–2, Art. XVIII(4)). Contracts in excess of $2,000 must be in writing, and advance approval of the AEC must be obtained in writing for those in excess of $10,000,[14] and for all purchases in any amount from du Pont's commercial divisions (Exh. P–2, Arts. XXII(1), III (7); III–R. 112–120).[14a] Procurement procedures must be reduced to writing and are made subject to the approval of the AEC (Exh. P–2, Art. XXII(1)). Vendors are on notice that all purchases are for the benefit of the Government and that title will pass directly from the vendor to the Government

[14] As the court below found, almost 75% of the dollar amount of purchases involved here fell into the category requiring "prior specific approval" of the AEC (Jur. St. 32, 39; III–R. 132–134).

[14a] For practical reasons, the AEC has given blanket advance approval of procurement purchases from du Pont of under $100 (III–R. 113, 131). These purchases are, of course, subject to subsequent audit and review.

(Exh. P-2, Art. XIII(1); Exhs. P-8, P-9, P-10; III-R. 55). Financing of all purchases is with Government funds, as noted *supra*, p. 20.

Among other things, AEC controls the flow of feed materials, the level of production and of inventories (III-R. 99, 103, 120), training programs, research and development projects and safety standards and procedures (Exh. P-2, Arts. VII, IX, XXIII; III-R. 107, 112-120), and can require du Pont to remove employees whose work is deemed incompetent or whose continued employment is contrary to the public interest (Exh. P-2, Art. XXIV(3); III-R. 116). Du Pont is required to choose a resident supervising representative "satisfactory to the Commission" (Exh. P-2, Art. XXIV(2)). As testified, and found by the district court, AEC maintains a staff of approximately 230 at the Savannah River Plant organized in divisions parallel to du Pont's organization. Through its on-site staff, the AEC is able to maintain close supervision and control of du Pont's activities and operations under the "detailed procedures" prescribed by AEC (Jur. St. 32; III-R. 98-99, 106-07).[15]

[15] Appellants' stipulation to the veracity of the complaint (III-R. 42, 48-49, 55) further establishes that, as alleged, the Savannah River Plant is "an integral and indispensable part of the processing and manufacturing facilities of the Atomic Energy Commission"; that du Pont's work is "carried on in close day-by-day cooperation with the Atomic Energy Commission and its staff"; and that AEC "established the objectives, made the decisions required to fit the operation into the national program and otherwise exercised the control and supervision necessary to assure achievement of the desired governmental objectives" and continues to do so (I-R. 13-14).

3. None of the foregoing facts is disputed by appellants. Their attack on the findings involves only the claim that, despite these facts, "du Pont [nevertheless] had a profit motive in this contract" (*supra*, p. 19). The court below explicitly found, however, that the company had undertaken the contract "without hope of gain, except the nominal one dollar, payable upon final completion of the contract" (Jur. St. 31), and that "[t]here is every indication that du Pont accepted this contract and its obligations out of the high sense of public responsibility, despite deprivation, which its president expressed to its stockholders in 1950" (Jur. St. 40).

Appellants challenge these findings, first, by asserting that du Pont is "not a charitable corporation" (Jur. St. 10). Of course this is so, but the evidence in the record is overwhelming and completely uncontroverted that du Pont's activities at the Savannah River Plant have been undertaken neither for profit nor for furtherance of its ordinary corporate interests. As the court below pointed out (Jur. St. 29, 40), this conclusion is compelled by the circumstances surrounding du Pont's undertaking of the project, including the fact that du Pont had previously withdrawn from operation of another atomic energy plant, that this assignment was taken on reluctantly and only at the urgent appeal of the AEC and the President of the United States as an essential defense measure, and that du Pont had no plans in 1950, and has none now, to enter the atomic energy field in a commercial venture (III-R. 51, 121, 139–141, 147–148). Its activities under the contract

have never been carried on the company's books as of value (III–R. 127, 135–36), and officials of both AEC and du Pont testified flatly that du Pont did not receive any known profit of any kind from such activities (III–R. 126, 128, 134–35, 140). See Statement, *supra*, pp. 3–4, n. 3.

Appellants further argued to the court below, and are now asking this Court to find, that a sufficient "profit motive" nevertheless existed because (1) du Pont sold a relatively small amount of its own commercial products to the Savannah River Plant and (2) du Pont is obtaining scientific training and experience for its Savannah River employees at Government expense (Jur. St. 31; III–R. 43–45). The district court specifically rejected these contentions in its findings (Jur. St. 39–41), which are fully supported by the record.

Whenever du Pont submitted price quotations for the supply of its commercial products, the AEC itself assumed direct control of the purchase, solicited bids from other suppliers, and awarded the order. This was in accordance with a specific contract provision making all such purchases subject "to the prior written approval of the Commission" (Exh. P–2, Art. III(7); *supra*, p. 22). The total commercial products of du Pont purchased at Savannah River were valued at only $1,379,000, less than ¼% of the $557,085,000 in materials procured during the period in issue (III–R. 13, 115, 131–132). On almost half of its offers in this category ($1,112,000 worth) du Pont in fact lost out to other bidders (Jur. St. 39–40; III–R. 112–113, 115–116, 131, 136–137). As the court below

summarized it, "[C]areful safeguards were employed to assure that du Pont's managerial functions did not influence the procurement of du Pont's products" (Jur. St. 40). Thus it appears that the purchase of du Pont's commercial products would have been the same regardless of the firm which was the management contractor. These purchases, therefore, do not constitute a profit arising from the management contract, could not have motivated du Pont, and cannot remotely be considered a "separable benefi[cial use]" for tax purposes (Jur. St. 40).

The alleged benefit from the scientific and technical training of du Pont employees is refuted by the fact already noted, that the Savannah River Plant is in a field in which du Pont has no commercial interest. Appellants' "speculation" on this point, in the words of the district court, "ignores the history of du Pont's withdrawal in 1946 from the management of the Hanford Engineer Works, its reluctant acceptance of its present commission, and the fact that the work at Savannah River Plant is now, and in all likelihood will long remain, a monopoly of Government" (Jur. St. 40).

In short, as the court below held (Jur. St. 40–41), the alleged advantage to du Pont is so indirect, tenuous and hypothetical as to be of no weight compared to the undisputed facts concerning the relationship of du Pont and AEC at the Savannah River Plant, set forth *supra*, pp. 19–26. The analogy of federal employees, cited by the court below, shows that even direct remuneration does not necessarily impair the Government's tax immunity for governmental activities which are carried out by "a 'servant' of the United States" (*United States* v. *Township of Mus-*

kegon, 355 U.S. 484, 486). Whether an individual or a company falls in the category of those whose activities are thus constitutionally immune from state taxation depends upon the entire relationship with the Government, and on the appraisal of the applicable contractual provisions and all the pertinent facts. The district court made just such an appraisal in this case, and concluded that under the contract du Pont was intended to be, and in fact is, the "alter ego" of the United States without any separable beneficial interest or "hope of gain" (Jur. St. 31); that such activities "resulted in the sales of goods and services to the United States"; that the "purchases were those of the United States"; and that the use of the goods was "completely that of the United States" (Jur. St. 38–39, 41). On the basis of these findings, the district court properly enjoined the imposition of state sales and use taxes upon du Pont's purchases and use of AEC property at the Savannah River Plant.[16]

CONCLUSION

The court below correctly applied settled principles to the particular facts of this case. Accordingly, this

[16] With respect to sales taxes, the court below made an additional and alternative determination that du Pont's purchases were in effect as "purchasing agent" for AEC (Jur. St. 38–39). This was in line with decisions of this Court that have recognized the immunity of acts done, whether or not for personal gain, by those who have the authority to act for the United States and impose legal liability upon it. See *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 120–122; *Alabama* v. *King & Boozer*, 314 U.S. 1, 13–14.

Appellants challenge the above finding on the ground that the contract here employs the term "agent" only with regard to rental of government housing (Exh. P-2, Art III(11); Jur. St. 11). However, the court properly rejected this argument, pointing out (Jur. St. 38–39): "An agent * * * need not be

appeal presents no substantial question warranting further argument. The judgment of the district court should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
MYRON C. BAUM,
Attorney.

LOREN K. OLSON,
General Counsel,
ALLEN M. COKER,
Chief Counsel,
Savannah River Operations Office,
LIONEL KESTENBAUM,
Attorney,
Atomic Energy Commission.
HUGH K. CLARK,
DANIEL F. MARPLE, II,
W. GRAHAM CLAYTOR, Jr.,
STEPHEN J. POLLAK,
COVINGTON & BURLING,
Attorneys for E. I. du Pont de Nemours and Company.

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called by that name to be one. Liabilities of principals and immunities from taxation are not dependent upon the use, or omission, of a magic label. It is clear that du Pont's procurement activities were authorized, and were openly on behalf of the United States, and at the government's expense and risk." While referring to du Pont as the equivalent of a purchasing agent for the United States, the court below recognized that federal procurement provisions applied to du Pont's activities only to the extent prescribed by the contract between AEC and du Pont (Jur. St. 31–32).

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